No. 11736

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

E. ROYCE, B. ROYCE and A. H. WENCK, doing business as GRAY LINE TOURS,

Appellants

vs.

CLARK SQUIRE, Collector of Internal Revenue for the District of Washington,

Appellee

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

BRIEF FOR APPELLEE

THERON LAMAR CAUDLE,
Assistant Attorney General.

SEWALL KEY,
A. F. PRESCOTT,
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BRIEF FOR APPELLEE

OPINION BELOW

The oral opinion of the District Court (R. 145-153) is unreported. Its findings of fact and conclusions of law (R. 23-34) are reported in 73 F. Supp. 510.

JURISDICTION

This action was brought to recover transporta-

tion taxes assessed and collected under Section 3469 of the Internal Revenue Code for the period October, 1941, through September, 1944. A claim for refund was filed within four years from the time of payment, as provided by Section 3313 of the Internal Revenue Code, and was rejected by the Commissioner of Internal Revenue on June 19, 1945. (R. 25.)

This suit was commenced on April 2, 1946 (R. 2-4), within the time allowed by Section 3772 (a) (2) of the Internal Revenue Code. The jurisdiction of the District Court was invoked under the provisions of Section 24, Fifth, of the Judicial Code, as amended. Judgment of the District Court was entered on June 16, 1947 (R. 22, 38-39), and notice of appeal was filed on August 22, 1947. (R. 40-41.) This Court has jurisdiction of the matter pursuant to Section 128 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether Section 130.58 of Treasury Regulations 42 properly construes Section 3469 of the Internal Revenue Code.

2. Whether taxpayers' motor cars were operated on an established line within the meaning of Section 3469.

3. Whether the taxpayers were prejudiced by the trial court's ruling on the admission of evidence.

4. Whether the additional findings of fact requested by taxpayers are necessary or proper.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations involved may be found in the Appendix, *infra*.

STATEMENT

The taxpayers are engaged in the business of transporting passengers by motor vehicle under the name and style of Gray Line Tours, with their principal place of business in Seattle, Washington. (R. 24.) In May, 1941, they entered into an agreement with United Airlines under which they agreed to provide transportation by limousine for United's passengers to and from Boeing Field Airport in Seattle. Similar arrangements were subsequently made by taxpayers with Northwest Airlines and Pan-American World Airways. (R. 26.)

The transportation services were performed by taxpayers with a fleet of seven-passenger limousines, which were for the most part painted in a uniform color and identified by printed rectangular signs bear-

ing the designation "Air Line Service", "Gray Line Tours". During most of the time, the vehicles were further identified by painted detachable emblems of the airline companies, the emblem used at a particular time depending on which airline's passengers were being transported. (R. 26-27.)

Limousine service for airline patrons was provided in the following manner:

When passengers purchased their tickets for a scheduled flight, they were asked by an airline employee if they desired limousine service to the airport. If passengers requested such service, they were informed of the places at which they could board the limousines, which were usually the airlines' own office or designated hotels. They were also advised of the time when the limousines would depart from those places, the departure time being approximately one hour prior to flight time. Thereafter, the airlines would notify Gray Line when the flight was departing and would furnish it with the names of the passengers who were to be transported and the places at which they were to be picked up. (R. 27-28.) Like arrangements were made for incoming passengers; prior to arrival of an incoming flight, the airline would advise Gray Line of the arrival time and the latter would then send a limousine to transport pass-

engers desiring service to downtown Seattle. (R. 28.) Approximately fifty per cent of airline passengers used limousines in travelling to or from the airport. (R. 29.)

Patrons desiring transportation to the airport were picked up only at designated points in the downtown area and pursuant to a telephone call from the airlines to the taxpayers. The limousine drivers were instructed by taxpayers to follow the most direct route to the airport, and in practice usually travelled over one of two routes except in cases where road repairs or traffic congestion compelled them to travel on other streets. (R. 28-29.)

The airlines did not sell or issue tickets that were good for transportation in the limousines. (R. 27.) Instead, the fares were paid by the passengers directly to the limousine drivers. Prior to October 1, 1941, the one-way fare to or from Boeing Field was seventy-five cents a passenger. When Section 3469 of the Internal Revenue Code, imposing a five per cent tax on transportation became effective on that date, taxpayers increased the one-way fare to eighty cents a person. Subsequent increases in the transportation tax rates by amendments to the revenue laws were attended by simultaneous fare increases by taxpayers to cover the added tax. When a passenger asked what

the fare included, the driver stated that it included the tax. (R. 31-32.)

Where limousine passengers were carried at the expense of an airline the latter paid taxpayer an agreed amount per passenger plus an additional amount separately billed as a tax, the added amount being the transportation tax then in effect. (R. 32.)

The limousine met all incoming flights (R. 30) and approximately ninety-nine per cent of the outgoing flights. (R. 124.)[1] From ten to fifteen per cent of the flights were postponed due to weather conditions. (R. 29.)

The case was presented to the court below for the determination of two issues which were defined by the pre-trial order. (R. 7-21.) The first was whether or not the taxpayers, in transporting passengers to or from the airport, were operating their vehicles on an established line within the meaning of Section 3469 of the Internal Revenue Code. The second issue was whether the taxpayers had paid the amounts in suit from their own funds or had otherwise established the right to sue for their refund. (R. 15-16.)

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[1] While the trial court made no finding to that effect, the uncontradicted testimony of taxpayers' witness was that the limousines met all but one per cent of scheduled outgoing flights. (R. 123-124.)

The trial court found against the taxpayers on the first issue, holding that their limousines were operated on an established line within the meaning of the statute. In so holding, the court rejected the taxpayers' contention that Section 130.58 of Treasury Regulations 42 was invalid as contrary to the intent and purpose of the statute. While expressing the view that it would also be inclined to hold against taxpayers on the second issue were it necessary to pass on it, the court reserved decision on that issue. (R. 145-153.) Finding as it did that the limousines were operated on an established line, the court concluded that the taxes in suit had been properly collected and dismissed the complaint. (R. 33-34.)

SUMMARY OF ARGUMENT

I. As used in the statutes taxing the transportation of persons by motor vehicles, an established line has been consistently construed by the applicable regulations to mean a regularity of operations of motor vehicles between definite points. During the period that this statutory term has appeared in the revenue laws, Congress has on several occasions reenacted or amended the transportation tax laws without disturbing this definition, and has thereby expressed its approval of the regulations and given them the force of law.

II. The question of whether taxpayers' limousines were in fact operated on an established line was fully litigated below and determined adversely to the taxpayers. This determination was supported by substantial evidence and should not be disturbed on appeal.

III. When a ruling on the admissibility of evidence is challenged on appeal, the person asserting the error must show not only that error has been committed but also that it was prejudicial to him. Taxpayers have been unable to show that they were prejudiced by the trial court's action in admitting the challenged evidence and it is therefore unnecessary for this Court to consider whether the evidence was properly admitted.

IV. The trial court's findings of fact should consist only of a concise statement of the essential facts rather than a detailed summarization of the evidence from which those facts are determined. The additional findings of fact requested by the taxpayers amounted to little more than a recapitulation of evidence, and were properly excluded from the findings made by the court.

ARGUMENT

I

THE DISTRICT COURT PROPERLY DETERMINED THAT TAXPAYERS' VEHICLES WERE OPERATED ON AN ESTABLISHED LINE

A. *The Regulations correctly define the term "operated on an established line"*

Section 3469 of the Internal Revenue Code (Appendix, *infra*) levies a tax upon amounts paid within the United States for the transportation of persons by rail, motor vehicle, water, or air. However, as applied to transportation in motor vehicles having a seating capacity of less than ten adult persons, the tax is applicable only if the vehicles are operated on an established line. It is with the latter limitation that we are concerned since all of the transportation services involved here were performed with seven-passenger motor cars operated by the taxpayers.

The statute itself does not define the terms "established line" or "operated on an established line". However, by Section 130.58 of Treasury Regulations 42 (Appendix, *infra*), the Commissioner of Internal Revenue has undertaken to supply a definition. That section provides in part as follows:

> The term "operated on an established line" means operated with some degree of regularity between definite points. It does not necessarily mean that strict regularity of schedule is maintained; that

> the full run is always made; that a particular route is followed; or that intermediate stops are restricted. The term implies that the person rendering the service maintains and exercises control over the direction, route, time, number of passengers carried, etc. It implies also that the primary contract between the operator and the person served is for the transportation of the person and not for the hire or use of the vehicle.

The principal question here is whether this provision of the Regulations properly construes Section 3469 of the Internal Revenue Code, as held by the court below, or whether the Regulations are contrary to the intent and meaning of the statute, as contended by the taxpayers.

The taxpayers have challenged the validity of Section 130.58 of Regulations 42, on several grounds. They contend *inter alia* that the word "established" as used in the statute necessarily connotes creation or approval by a governmental authority and that therefore the phrase "operation on an established line" must mean operation over a route fixed by a regulatory government agency. (Br. 16-17.) They further contend that the Regulations have improperly limited the requirement of regularity of operation by providing that strict regularity of schedule need not be maintained, nor a fixed route followed or intermediate stops restricted. (Br. 20-21.)

We think that several answers may be made to

these contentions. For example, it should be noted that as used by the Commissioner in the applicable Regulations, the word "established" means permanent, recurring, or regular as opposed to sporadic or casual. This is a commonly accepted meaning of the term, and has been applied in various connections. *Wells Lamont Corp. v. Bowles*, 149 F. (2d) 364 (Em. App.); *U. C. C. v. Collins*, 182 Va. 426, 29 S.E. (2d) 388. Therefore, even if it be assumed that the interpretation contended for by the taxpayers is a permissible one, it must yield to that adopted by the Commissioner, for the law is well established that where there is doubt as to the construction of a statute, the contemporaneous interpretation of the law by the department charged with its enforcement is generally held to be controlling where not arbitrary or unreasonable. *Brewster v. Gage*, 280 U.S. 327; *Maryland Casualty Co. v. United States*, 251 U.S. 342; *R. J. Reynolds Tobacco Co. v. Commissioner*, 97 F. (2d) 302 (C.C. A. 4th), affirmed, 306 U.S. 110.

However, the short answer to the many charges leveled by taxpayers against the Regulations may be found in the fact that the Commissioner's interpretation of the term "operated on an established line" has continued without material change since that language first appeared in the transportation tax laws, and

must now be deemed to have received Congressional approval and to have the force and effect of law. *Crane v. Commissioner*, 331 U.S. 1; *Helvering v. Winmill*, 305 U.S. 79.

The tax on transportation of persons by motor vehicles first appeared in the Revenue Act of 1917, c. 63, 40 Stat. 300. Section 500 of that Act provided in material part as follows:

> Sec. 500. That from and after the first day of November, nineteen hundred and seventeen, there shall be levied, assessed, collected, and paid * * * (c) a tax equivalent to eight per centum of the amount paid for the transportation of persons * * * by any form of mechanical motor power on a regular established line when in competition with carriers by rail or water * * *.

The Act did not define the term "regular established line" and so far as we have been able to determine, no administrative interpretations of that language were issued under the 1917 statute. The transportation tax was reenacted in substantially identical terms in Section 500 of the Revenue Act of 1918, c. 18, 40 Stat. 1057. Following passage of the 1918 statute, the Commissioner promulgated Treasury Regulations 49 (1919 ed.) relating to the collection of tax on transportation and other facilities. So far as relevant here, these Regulations provided as follows:

> Art. 39. *Regular established line.* — The phrase "a regular established line" as used in Section 500, subdivision (c), is held to mean a regularity of operation of transportation facilities by motor power between definite points. If such motor transportation is furnished with regularity between points which are connected by rail or water routes, it is not necessary that the automobile or motor transportation pursue a specified route of travel. The regularity of operation of the motor transportation is the essential element of "a regular established line."

The tax on transportation was repealed on January 1, 1922, by Section 1400 of the Revenue Act of 1921, c. 136, 42 Stat. 227. In the meantime, however, the regulatory provisions quoted above were presumably accepted as a correct interpretation of the law and applied by the Commissioner in administering the statute.

Following repeal of the transportation tax in 1922, no further attempt was made to tax the carriage of persons by motor vehicles until Section 3469 was added to the Internal Revenue Code in 1941. While that statute was of broader application than its predecessors and differed somewhat in terms from them, it retained the language of the earlier Acts relating to operations of motor vehicles on an "established line". Accordingly, when Treasury Regulations 42 were promulgated in 1942, the Commissioner adopted without material change the definition of

"established line" that was embodied in the earlier Regulations. In so doing, the Commissioner followed the only course open to him since the legislative approval of the former Regulations, by reenactment of the statutory provision to which they relate, clearly gave such Regulations the force of law and expressly negated the authority of the Commissioner to repeal the earlier interpretation. *Helvering v. Reynolds Co.*, 306 U.S. 110. Moreover, since 1941, Section 3469 of the Internal Revenue Code has twice been amended as to rates[2] but Congress has not seen fit to disturb the Commissioner's Regulations.

Thus the regulatory provisions have remained substantially unchanged since 1918, and during that period, Congress repeatedly has reenacted the provision of the revenue laws on which they are based. This action was taken with knowledge of the construction placed upon the statute by the Commissioner. If Congress had considered this interpretation erroneous, it would have amended the law. Its failure to do so requires the conclusion that the interpretation was not inconsistent with the intent of the statute (*Mass. Mutual Life Ins. Co. v. United States*, 288 U.S. 269) and gives to the Regulations the effect of law (*Crane*

[2] Section 609 of the Revenue Act of 1942, c. 619, 56 Stat. 798, and Section 302 (a) of the Revenue Act of 1943, c. 63, 58 Stat. 21.

v. Commissioner, supra; Helvering v. Reynolds, supra).

B. *The evidence supports the District Court's determination that taxpayers' vehicles were operated on an established line.*

Assuming the validity of the Regulations, the evidence supports the determination of the District Court that the taxpayers' vehicles were operated on an established line.[3] The testimony showed that the limousines were operated with reasonable regularity conforming with the scheduled operations of the three airlines with whom taxpayers had working agreements. (R. 73, 97, 99, 100, 119, 121.) All operations were between definite points, Boeing Field Airport on the one hand, and the downtown area of Seattle on the other hand. (R. 109, 111, 118, 128, 130.) Outgoing passengers were picked up only at a limited number of places and carried directly to the airport (R. 62, 64, 71, 81, 110, 116-117) while incoming passengers were transported from Boeing Field to the downtown area, with discharge privileges at interme-

[3] While the trial court treated this as a conclusion of law, it appears to be more properly a finding of fact. If so, its effect as a finding is not changed by the erroneous designation. *Alexander v. Johnston*, 137 F. (2d) 712 (C.C.A. 9th); *Smith v. Fletcher*, 152 F. (2d) 20 (App. D.C.); *Lewis v. Ingram*, 57 F. (2d) 463 (C.C.A. 10th), certiorari denied, 287 U.S. 614.

diate points, as permitted by the Regulations (R. 70, 128). While the limousines were not dispatched on a trip without first receiving advice from the airlines of the arrival or departure of scheduled flights, the evidence conclusively established that the only person authorized to dispatch the limousines were taxpayers' own employees (R. 92, 116, 118, 129) and that in travelling between the airport and the downtown area the vehicles travelled over routes of their own choosing (R. 59, 61, 85, 93, 96). Finally, it is undisputed that the primary contract between taxpayers and the passengers was for the transportation of the passengers and not for hire or use of the vehicle. (R. 9.)

Hence it appears that in the conduct of their business, taxpayers operated their motor vehicles with regularity between definite points, maintaining and exercising control over such matters as the direction and route adopted, schedules, and number of passengers carried. They were, therefore, engaged in the operation of an established line within the meaning of the applicable statute and Regulations.

II

THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR BY ADMITTING EXHIBIT A-1 INTO EVIDENCE

In the course of the trial, the court admitted into

evidence over taxpayers' objections an exhibit offered on behalf of the Collector. (R. 62-63.) The exhibit to which this objection was directed consisted of a communication written by one employee of United Airlines to another employee or officer of the same concern, describing the routes and schedules followed by the airport limousines when conveying passengers between Boeing Field and downtown Seattle. It is contended that since this communication was not addressed to the taxpayers, it was simply hearsay and, therefore, not properly admissible. However, it is not necessary to consider whether the letter should have been admitted in evidence for the rule is that where the admissibility of evidence is challenged on appeal, the burden is on him who alleges the error to show not only that it existed but further that it was prejudicial to him. *United States v. Crescent Amusement Co.*, 323 U.S. 173; *Drybrough v. Ware*, 111 F. (2d) 548 (C.C.A. 6th); *Marin v. Ellis*, 15 F. (2d) 321 (C.C.A. 8th). There has been no showing here that the taxpayers were prejudiced by admission of the letter, and it is unlikely that such a showing can be made since the matters covered by the letter were also established by other evidence in the case. Several witnesses testified to the routes followed by the limousines (R. 60-61, 85, 88) and to the pick-up and discharge points (R. 61-62, 71, 81-82), which were

dealt with in the first two paragraphs of the letter, while the pre-trial order covered the subject matter of the third and concluding paragraph of the letter (R. 8). Thus even assuming error in the introduction of the exhibit, the facts with which it purported to deal were fully established by other competent evidence and consequently the error, if any, in permitting the letter to be introduced, was not prejudicial.

III

ADDITIONAL FINDINGS OF FACT WERE NOT NECESSARY

Error is also assigned to the failure of the court below to make certain additional findings of fact. (Br. 8-10.) The requested findings, sixteen in number, are for the most part simply a laborious recapitulation of the evidence and have no place in the trial court's findings. Findings of fact should not be discursive; they should not state the evidence or any of the reasoning upon the evidence, but should contain only a statement of the ultimate facts found by the courts. *Petterson Lighterage & T. Corp. v. New York Central R. Co.*, 126 F. (2d) 992 (C.C.A. 2d); *Brown Paper Mill Co. v. Irvin*, 134 F. (2d) 337 (C.C.A. 8th); *United States v. Forness*, 125 F. (2d) 928 (C.C.A. 2d), certiorari denied, 316 U.S. 694. Since the pres-

ent findings of fact and conclusions of law, together with the opinion, furnish a clear understanding of the basis of the District Court's decision, no purpose would be served by incorporating into the findings the elaborate and particularized itemization of evidence which taxpayers now request. Cf. *Rossiter v. Vogel*, 148 F. (2d) 292 (C.C.A. 2d); *Tulsa City Lines v. Mains*, 107 F. (2d) 377 (C.C.A. 10th).

While not directly germane to the issues involved in this appeal, it is not inapposite to note that in no event could the taxpayers prevail in this action since it is apparent from the court's opinion and its findings that the taxes in suit were paid by passengers of the limousines and not borne by the taxpayers. Since there has been no showing that these amounts have been repaid to the persons who paid them or that the consent of such persons has been obtained to the allowance of the refund sought here, taxpayers are barred from recovery by Section 3471 of the Internal Revenue Code (Appendix, *infra*).

CONCLUSION

The judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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January, 1948.

APPENDIX

Internal Revenue Code:

SEC. 3469[3] [as added by Section 554 of the Revenue Act of 1941, c. 412, 55 Stat 687]. TAX ON TRANSPORTATION OF PERSONS, ETC.

(a) *Transportation.* There shall be imposed upon the amount paid within the United States, on or after October 10, 1941, for the transportation, on or after such effective date, of persons by rail, motor vehicle, water, or air, within or without the United States, a tax equal to 5 per centum of the amount so paid. * * * Such tax shall apply to transportation by motor vehicles having a passenger seating capacity of less than ten adult passengers, including the driver, only when such vehicle is operated on an established line.

* * *

(26 U. S. C. 1940 ed., Sec. 3469.)

SEC. 3471. REFUNDS AND CREDITS.

(a) Credit or refund of any overpayment of tax imposed by Subchapter B, Subchapter C, or Subchapter E may be allowed to the person who collected the tax and paid it to the United States if such person establishes, to the satisfaction of the Commissioner, under such regulations as the Commissioner with the approval of the Secretary may prescribe, that he has repaid the amount of such tax to the person from whom he

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[3] During the period involved, this statute has remained substantially the same except as amended as to rates by Section 609 of the Revenue Act of 1942, c. 619, 56 Stat. 798, and Section 302 (a) of the Revenue Act of 1943, c. 63, 58 Stat. 21.

collected it, or obtained the consent of such person to the allowance of such credit or refund.

* * *

(26 U. S. C. 1940 ed., Sec. 3471.)

Treasury Regulations 42 (1942 ed.):

SEC. 130.58. *Motor Vehicles with Seating Capacity of Less Than 10.*—No tax is imposed on transportation by a motor vehicle having a seating capacity of less than 10 adult passengers, including driver, unless such vehicle is operated on an established line. The term "operated on an established line" means operated with some degree of regularity between definite points. It does not necessarily mean that strict regularity of schedule is maintained; that the full run is always made; that a particular route is followed; or that intermediate stops are restricted. The term implies that the person rendering the service maintains and exercises control over the direction, route, time, number of passengers carried, etc. It implies also that the primary contract between the operator and the person served is for the transportation of the person and not for the hire or use of the vehicle.